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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTIN ALAN IRVIN,

Defendant and Appellant.

A153297

(San Francisco City and County
Super. Ct. No. SCN 225665)

During a commercial burglary committed by Ryan Washington and defendant Justin Irvin, a security guard shot and killed Washington, and Irvin returned fire before escaping. After a bench trial, the trial court found Irvin guilty of second degree burglary, possession of a firearm by a felon, and carrying a loaded firearm in public. It acquitted him of several felonies, however, including attempted murder, based on a finding that he shot at the security guard in self-defense. He was sentenced to three years and eight months in prison, a paper commitment based on his presentence custody credits, and placed on parole.

Irvin's sole contention on appeal is that, given the trial court's finding of self-defense, insufficient evidence supports his convictions for possession of a firearm by a felon and carrying a loaded firearm in public. We disagree and affirm.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

Irvin and Washington were friends and often hung out together. Irvin testified that early on the morning of October 11, 2015, Washington arrived at Irvin's apartment in Oakland.¹ Irvin's girlfriend, Angel Grayson, was also present. Washington told Irvin that a store in San Francisco had "ripped him off," because it refused to reimburse him after he bought a defective hoverboard there. The two men formulated a plan to break into the store before it got light and steal some hoverboards in retribution.

A few hours later, Irvin, Washington, and Grayson left the apartment in Grayson's car. Grayson drove, with Irvin in the front passenger's seat and Washington behind Irvin in the backseat. Irvin knew that Washington, a drug dealer, routinely carried guns and had a gun in his jacket pocket that morning. Grayson and Irvin were not familiar with San Francisco, and although Washington used a maps app on his phone to direct them, they took the wrong exit and got lost.

By the time the group arrived at the store, near Broad and Plymouth, it was approximately 7:30 a.m. and the sun was coming up. Irvin told Washington that they "should do this another time, because . . . the burglary hours were over" and they did not have the cover of darkness. Washington, however, wanted to proceed with the plan.

Grayson parked nearby, and the two men got out of the car. Washington left his jacket with the gun on the backseat. After waiting until some people at a bus stop nearby were picked up, the two men tried to break into the store's front window, where several hoverboard boxes were on display. Irvin was ultimately able to break a side window, and Washington began grabbing boxes and throwing them on the sidewalk while Irvin took them to the car.

While Irvin was on his way to load more boxes into the car, a security guard inside the store shot at Washington, hitting him in the lower back. Washington fell to the

¹ The prosecution's evidence consisted of stipulations and surveillance footage of the incident, and Irvin was the only witness to testify.

ground and began crawling toward the car. Irvin testified that Washington told him to get the gun. Irvin got into the car's backseat, grabbed the gun, and turned to see the security guard shoot toward the car, hitting it. Irvin returned fire, and the guard ducked back into the store.

Meanwhile, Washington reached the car and grabbed Irvin's legs. Grayson pulled away from the curb as Irvin struggled to remain in the car. About halfway down the block, she stopped, and Irvin attempted to pull Washington into the car but was unable to do so. Washington let go of Irvin's legs and became unresponsive, and Irvin told a bystander to call 911. Washington ultimately died from the gunshot wound to his back.

Irvin and Grayson drove back to Oakland, and Irvin hid the gun. About two weeks later, he was arrested with the same gun in his possession. He was ultimately charged with eight felony counts: attempted murder, with an accompanying allegation of personal and intentional discharge of a firearm; assault with a semiautomatic firearm, with an accompanying allegation of personal use of a firearm; second degree robbery, with an accompanying allegation of personal and intentional discharge of a firearm; first degree residential burglary; second degree commercial burglary; discharge of a firearm from a motor vehicle; possession of a firearm by a felon; and carrying a loaded firearm in public.²

Irvin waived his right to a jury trial, and a bench trial was held.³ It was stipulated that he had a previous felony conviction, and he conceded in his opening statement that

² The charges were brought under Penal Code sections 187, subdivision (a) and 664 (attempted murder), 245, subdivision (b) (assault with firearm), 211 (robbery), 459 (first and second degree burglary), 29800, subdivision (a)(1) (felon in possession of firearm), and 25850, subdivision (a) (carrying loaded firearm in public), and Vehicle Code section 26100, subdivision (c) (discharge of firearm from vehicle). The firearm-enhancement allegations were made under Penal Code sections 12022.53, subdivision (c) (personal and intentional discharge) and 12022.5, subdivision (a) (personal use). An allegation that the attempted murder was willful, deliberate, and premeditated was dismissed before trial. All further statutory references are to the Penal Code.

³ Grayson was also charged and tried for her role in the incident, but she is not a party to this appeal.

he was guilty of second degree burglary. At the close of the prosecution's case, the trial court granted Irvin's motion for acquittal of the first degree burglary charge, finding that there was insufficient evidence to support the prosecution's theory that the security guard resided at the store.

After hearing testimony from Irvin, the trial court found him guilty of second degree burglary and both firearm-possession offenses. Based on its conclusion that Irvin shot at the security guard in self-defense, however, the court found Irvin not guilty of attempted murder, assault with a firearm, robbery, and discharge of a firearm from a vehicle. He was sentenced to three years and eight months in prison, composed of the aggravated term of three years for the burglary and a consecutive term of eight months for being a felon in possession of a firearm, and an eight-month term for the other firearm-possession conviction was imposed and stayed.

II. DISCUSSION

Irvin claims that his convictions for the two firearm-possession offenses cannot stand in light of the trial court's finding that he acted in self-defense when he shot toward the security guard. In evaluating this claim, “ ‘we review the whole record to determine whether . . . [there is] substantial evidence to support the verdict . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the [trial court] could reasonably have deduced from the evidence.’ ” (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

The convictions at issue were under sections 29800, subdivision (a)(1) and 25850, subdivision (a). The former provides that anyone previously convicted of a felony “who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.” (§ 29800, subd. (a)(1).) The latter prohibits anyone previously convicted of a felony from “carrying a loaded firearm . . . on the person or in a vehicle

while in any public place or on any public street in an incorporated city.” (§ 25850, subds. (a), (c)(1).)

Relying on *People v. King* (1978) 22 Cal.3d 12 (*King*), Irvin argues that the trial court could not find him guilty of the firearm-possession offenses based on his use of the gun in self-defense. In *King*, the Supreme Court held that section 12021, the predecessor of section 29800, “was not intended to affect a felon’s right to use a concealable firearm in self-defense, but was intended only to prohibit members of the affected classes from arming themselves with concealable firearms or having such weapons in their custody or control in circumstances other than those in which the right to use deadly force in self-defense exists or reasonably appears to exist. Thus, when a member of one of the affected classes is in imminent peril of great bodily harm or reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate section 12021.” (*King*, at p. 24; see *In re Charles G.* (2017) 14 Cal.App.5th 945, 952, fn. 6.)

We agree with Irvin that under *King*, his convictions under sections 29800 and 25850 cannot be premised on his possession of the gun while he was acting in self-defense. The Attorney General does not argue otherwise, instead maintaining that *King* is distinguishable because of the evidence that Irvin “actually and constructively possessed the loaded gun” before arriving at the store and “possessed the gun longer than was necessary for his and Grayson’s defense.”

Irvin responds that there is no evidence from which to infer that he possessed the gun before the security guard shot at Washington, especially given that Washington was sitting alone in the backseat. But even assuming there was insufficient evidence that Irvin possessed the gun before the shooting, the evidence permitted the reasonable inference that he possessed it after the shooting for a period “longer than that in which the necessity or apparent necessity to use it in self-defense continue[d].” (*King, supra*, 22 Cal.3d at p. 24.) Irvin admitted he still had the gun when he and Grayson left the

scene, testifying that when they got back to Oakland he initially “left it in the car,” and it was in his possession weeks later when he was arrested.

Irvin argues that there would be “a jurisdictional problem” with convicting him in San Francisco based on his possession of the gun in Alameda County and that “it is fairly obvious that requiring [him] and Grayson to rid themselves of Washington’s pistol somewhere in San Francisco on their return to Alameda County was foreclosed not only by their lack of familiarity [with] San Francisco . . . but [also] by their lack of knowledge of who or what in San Francisco the firearm should be submitted to.” We are not persuaded. Even assuming that the prosecution needed to show that Irvin possessed the gun in San Francisco, there is substantial evidence from which to infer that he possessed the gun from the time he left the scene to the time Grayson’s car entered Alameda County, and he provides no authority for excusing his continued possession based on inconveniences he may have faced in ridding himself of the gun. Indeed, he testified that he was on his way to sell the gun when he was arrested, suggesting he never intended to dispose of the gun lawfully.

Finally, we reject Irvin’s suggestion that reversal is required because the “lack of an express finding by the trial court” that *King* applied preserved “the distinct possibility that [the convictions] might have been based on [his] defensive possession of Washington’s gun.” In so arguing, Irvin attempts to draw an analogy to the rule that when a jury is instructed “ ‘on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.’ ” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1122, quoting *People v. Green* (1980) 27 Cal.3d 1, 69.) Even if the *Green* rule could apply in a bench trial, Irvin does not identify anything to show that the court convicted him of the firearm-possession offenses on the basis that he possessed the gun while acting in self-defense. In fact, the record shows that the parties addressed *King*’s applicability, the court considered CALCRIM No. 2514, the form instruction on temporary possession of a firearm by a felon in self-defense, in rendering its verdict, and the court stated at sentencing that Irvin was “convicted of being

in possession of a firearm separate from the use of it, when the court determined that he was acting in self-defense.” Substantial evidence supports both firearm-possession offenses.

III.
DISPOSITION

The judgment is affirmed.

Humes, P.J.

WE CONCUR:

Margulies, J.

Banke, J.